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The Availability of the New Federal Rules for Use in the State Courts of Ohio*

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While rules of procedure designed for the federal courts may not, in all respects, be suitable for use in the courts of a state on account of differences in jurisdiction and organization, many features of the new federal practice offer suggestions for desirable improvements in the procedure of the state courts. The principles embodied in the new federal rules were largely derived from rules actually employed in various states in this country, and in jurisdictions abroad, where the English common law is administered. They were drafted with the definite purpose of seeking and adopting the most effective methods of solving the various procedural problems which had been successfully tested in actual experience anywhere in the English speaking world, and they contain comparatively few features which are completely novel.

In framing the rules it was the aim to confine them as far as possible to general operative principles, leaving details so far as practicable to the discretion of the courts and to the judg-

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ment of counsel. Simplicity was sought as a primary quality in order to remove the opportunities for technical objections and arguments which are invariably produced by restrictions, limitations, conditions, and exceptions. Vague phrases of uncertain meaning and words which have proved troublesome in the past were avoided, and fictional elements, heretofore so characteristic of rules of procedure, were almost completely eliminated. The final test to which all the rules were subjected was convenience and effectiveness, rather than logic or orthodox regularity.

An enumeration of those features of the federal rules which are of special interest as possible models for state practice, should include at least the following:

1. Form of Procedure

The federal rules go further than those of many states, including Ohio, in reducing procedure to a single form. Ohio still distinguishes between "actions" and "special proceedings." The federal rules do not make this distinction but the same procedural methods are employed in all types of cases. Ohio has a special procedure for mandamus, and probably for prohibition which follows mandamus. Under the federal rules mandamus is an ordinary civil action with no special rules to control it.

In the report of the Advisory Committee on Rules for Civil Procedure published in April, 1937, the single form of procedure was extended, as far as applicable, to proceedings for condemnation of land. The rule regulating condemnation was not retained in the final draft, and does not appear in the rules as adopted by the Supreme Court, but the draft of a rule which appears in the April report is an excellent model for a single form of proceeding for condemnation based upon the general plan of procedure in use in courts of general jurisdiction. Ohio has ten different methods for condemnation, which could easily be reduced to a single method based essentially upon the ordinary civil action, as exemplified in the draft referred to.

2. Pleadings

The word "facts" does not appear in the federal rules relating to pleadings, for the reason that that term has proved to be a very troublesome one. There is no workable definition of a "fact." The proper test of a good allegation should not be that it alleges "facts" but that it gives adequate information. Under the federal rules allegations will be deemed sufficient if they supply whatever information is necessary to enable the opposite party to plead or to prepare for trial. The simplicity and lack of technicality contemplated in the drawing of pleadings is illustrated by the model forms which are attached to the new federal rules as an appendix. Some of the allegations in those forms might be technically designated as conclusions of law, rather than facts of the orthodox issuable type, but they fully serve the purpose of giving information and are, therefore, considered suitable.

Allegations of legal capacity and corporate existence may be omitted in stating the plaintiff's claim (Rule 9-a). There is very rarely any dispute over either of them and it is thought that convenience will be served by ignoring them in the first instance and allowing the other party, in case he wishes to raise an issue in regard to them, to present it by a negative averment. This is an application of the same principle employed in the common statute which permits a general allegation of performance of conditions precedent but requires the adverse party to make a negative allegation as to performance of any condition regarding which he wishes to raise an issue.

Hypothetical and alternative statements of claims or defences are permitted (Rule 8-e). This merely recognizes that a party's true position is often either a hypothetical or an alternative one and that the pleadings ought to frankly show it.

In order to secure honest denials so far as possible the federal rules require that each allegation shall be admitted or denied and that a general denial shall not be used unless the party in good faith intends to controvert every fact alleged in

the opposite pleading. Such a situation will almost never occur. As a matter of convenience qualified general denials, which are directed to all facts not expressly admitted, are authorized, and when one has no knowledge or information sufficient to form a belief as to the truth of an averment he is permitted to so state, and this has the effect of a denial. In Ohio it seems that the pleader is required to positively deny the facts in such a case and then relieve his conscience by following his false and fictitious denial with a statement of his want of knowledge (*State ex rel.* v. *Commissioners*, 11 Ohio St. 183).

No general requirement for the verification of pleadings is made by the federal rules. Sworn pleadings, as experience has shown, are no more likely to be true than unsworn pleadings. The federal rules have attempted to secure truthfulness in pleading by another means. This is the requirement that every pleading must have the personal signature of at least one lawyer who is retained in the case and this signature, by the express provision of the rules, constitutes a certification by him that he has read the pleading, that there is good ground to support it, and that it is not interposed for delay. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. In view of the futility of ordinary verifications of pleadings, this plan of a certificate of counsel seems at least worth trying.

There is no absolute requirement that different claims and defences must be separately pleaded. Instead, it is provided that separate counts and defences may be employed when such action will facilitate clear presentation of the case (Rule 10-b). The use of separate counts often complicates the case and produces repetition and confusion. The flexible principle adopted by the federal rules seems more convenient than the absolute requirement of separate statements found in the Ohio Code (Ohio Gen. Code, secs. 11,308, 11,316).

Inconsistency between counts or defences is declared by the federal rules to be unobjectionable (Rule 8-e). The Ohio Code

absolutely bars inconsistent defences (Code, sec. 11,315), and the courts of Ohio have condemned inconsistent allegations (*Ass'n.* v. *O'Conner*, 29 Ohio St. 651). The practical result of a rigid prohibition of inconsistency is to victimize a party for inability to accurately forecast evidence to which he may have no access. This is essentially unfair. Apparent inconsistencies are often really alternatives and are legitimately used to provide adequate allegations to meet the uncertainties of proof. Even those courts which purport to condemn inconsistency avoid actually doing so by holding that two allegations or defences are inconsistent only when the proof of one tends to disprove the other—a test under which inconsistency becomes almost impossible. In other words the rule, being unfair, defeats itself.

3. Joinder of Causes of Action

The federal rules offer almost unlimited freedom of joinder of causes of action. All claims by a plaintiff against a defendant may be joined (Rule 18-a). In Ohio, as under most of the codes, only those claims may be joined which fall within some one of the arbitrary and specially enumerated classes. There is no possible inconvenience which can result from *pleading* claims together. It is only when different claims are *tried* together that inconvenience may result, but the federal rules meet this situation by providing that an order for separate trials may be made by the court whenever it would promote convenience.

Under the Ohio Code the parties must be the same in all claims which are joined (Sec. 11,307), but no such requirement is found in the federal rules. They permit joinder of claims where the parties are not the same, provided (a) they arise out of the same transaction, occurrence, or series of transactions or occurrences, and (b) involve a common question of law or fact (Rule 20-a). Under this liberal rule of joinder it would be possible to join claims for wrongful death against a person causing the original injury and a physician who subsequently treated

the case; claims for deceit by many security buyers who relied upon the same prospectus; claims by many shippers for goods lost or damaged by the same act; claims in the alternative against several tort feasors; claims against an officer and his surety and against the officer alone; claims against a defendant individually and as an administrator; claims for a single loss by fire against insurers liable upon several contracts; and as a special instance it is expressly provided that one may join a claim against defendant X for a judgment with a claim to set aside an alleged fraudulent conveyance made by defendant X to defendant Y (Rule 18-b).

4. Counterclaims

Under most American statutes, including the Code of Ohio, there are very severe restrictions upon the use of counterclaims. Thus, under the Ohio Code (Secs. 11,317, 11,319) they are restricted to claims arising out of the same transaction as the plaintiff's claim, or transactions connected with the same subject of action, or, in actions upon contracts, to cross claims also arising upon contract; and they are limited to claims by a defendant against a plaintiff between whom a several judgment might be had in the action. Under this language there can be no counterclaim against one of a number of joint plaintiffs nor by one of a number of joint defendants; nor can there be an independent claim in tort pleaded against a claim either in tort or contract, nor an independent claim in contract pleaded against a claim in tort, nor an independent claim in equity pleaded against any claim. These restrictions and limitations are abolished in the federal rules, which provide that any claim of any kind by any defendant against any plaintiff may be used as a counterclaim (Rule 13). All inconvenience which might otherwise result from such unrestricted use of counterclaims is avoided by the rule providing that the court may order separate trials whenever convenience would be served thereby.

Under the federal rules counterclaims are either compul-

sory or permissive. The compulsory counterclaim is one arising out of the same transaction; all other counterclaims are permissive. This distinction is based upon the principle of convenience that all matters involved in the controversy ought to be determined in the same action. The Ohio Code, however, overlooks this principle, and seeks to make all counterclaims compulsory by denying costs to the plaintiff who brings a subsequent action upon any claim which might have been used as a counterclaim (Code, Sec. 11,624).

5. Joinder of Parties

Parties jointly interested must join. This is the universal rule. But in dealing with parties not jointly interested the federal rules are far more liberal than those of most of the states. They permit such parties to join or be joined if they assert or there is asserted against them, jointly, severally, or in the alternative, any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences, if any common question of law or fact will arise. This is merely the general principle of equity which encouraged the determination of the entire controversy in a single suit. Convenience in administration is made the test of joinder. In Ohio, as under most codes, joinder of parties not jointly interested is much more restricted. Plaintiffs may join only if they are all interested in the subject of the action and in the relief demanded—a provision of uncertain meaning which has given rise to a great deal of litigation.

6. Class Actions

Class actions are based upon three fundamental principles, (1) the existence of too many parties to make it practical to bring them all before the court; (2) adequate representation by those who are present; and (3) community of interest among all parties. The community of interest which is sufficient for a class action may arise out of a joint or common right, or

out of several rights in the same property involved in the action, or out of several rights affected by a common question of law or fact where common relief is sought. These are the principles underlying class actions which are actually administered by the courts. The federal rule authorizing class actions is based explicitly upon these principles, and is stated in language which is clear and simple (Rule 23). The provision for class suits under the Ohio Code, on the contrary, is very vague and difficult to understand. It is as follows: "When the question is one of common or general interest of many persons, *or* the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (Code, sec. 11,257). This is the common code provision and it has given rise to endless litigation. The terms "general interest" and "many persons" which are employed in this provision are words of uncertain meaning. Furthermore the provision following the word "or" by its terms makes mere numbers and impractibility of actual joinder sufficient by itself, without any community of interest, sufficient for a class action. Taken literally the provision obviously is impossible to administer. Furthermore the statute does not require adequate representation, although this is certainly necessary for a class suit. Similar provisions, found in various codes, have produced an extraordinary amount of confusion. The federal rule is a simple statement of actual judicial practice.

7. Third Party Procedure

The federal rules provide that when a defendant is entitled to indemnity or contribution from a third party, he may bring in such party by leave of court and ask for a judgment against him, and the third party will be bound both by the adjudication of the main action and by the adjudication of the claim against himself (Rule 14). England has used this practice since 1875 and has found it convenient and effective (Order 16-A), New York has employed it since 1922 (Civ. Prac. Act, sec. 193), and

Wisconsin adopted it in 1935 (Stat. §260.19(1)). Its convenience is apparent.

8. Pre-Trial Procedure

Experience has demonstrated that pleadings can never, under any system of rules, serve as an adequate means for disclosing whether there are real issues in the case or what they are. Rules of pleading supply no test by which to distinguish between fictitious issues and real issues, and a party never knows from an inspection of the pleadings what points, if any, are going to be brought into actual dispute at the trial. Furthermore, the issues shown upon the pleadings are subject to change at any time by amendment. Many cases would be settled without trial, and all would be simplified, if the actual facts were understood by both parties. England undertook many years ago to provide a method of looking beneath the pleadings to discover the real points of issue (O. 38a). The parties were brought before a master at a preliminary stage, by a so-called summons for directions, and were there interrogated regarding various phases of the case for the purpose of ascertaining whether there were any genuine issues, and if so what they were, and mapping out the future course of the proceedings. The success attained encouraged a gradual extension of the scope of this preliminary inquiry. A report of the Royal Commission on "The Dispatch of Business at Common Law," published in 1936, recommended that it be broadened still further, as a means of eliminating fictitious issues and bringing about final settlements.

The federal rules have authorized a pre-trial procedure somewhat similar to that employed in England by the summons for directions. By Rule 16 any district court in its discretion may in any case or by general rule provide for a pre-trial hearing to consider the simplification of issues, amendments, admission of facts or documents, limitation of the number of expert witnesses, references, and any other matters likely to aid in the

trial of the cause. The order made at the pre-trial hearing will control the subsequent course of the action, if the hearing does not end in a final settlement of the case.

Pre-trial dockets have been established in a number of American cities following the procedure first developed by the Circuit Court of Wayne County, sitting in Detroit, Michigan. The effectiveness of this practice has been striking. In 1935 that court tried 2949 cases and during the same year it finally disposed of 2016 cases on the pre-trial hearing (6th Rep. Jud. Council of Mich., 43, 73). In Boston during a ten-months period in 1935-36 the Superior Court tried 1562 cases and during the same period disposed of 3075 cases on the pre-trial docket (3rd Rep. Jud. Council of N. Y., 232).

9. Discovery

Ohio has a broad and effective system of discovery but many Ohio lawyers feel that it is frequently abused. Some of the provisions found in the federal rules would tend to eliminate such abuses, while others would extend the use of discovery various ways.

The federal rules offer the alternative in every instance of written interrogatories or oral examinations for discovery (Rule 26-a). Written interrogatories are much less expensive, are entirely adequate in many situations, and should be freely available at the party's election.

The federal rules make express provision for a large variety of protective orders where attempts are made to conduct the discovery examination in such a way as to embarrass or annoy either parties or deponents. Thus by Rule 30-b the court in which the action is pending may for good cause shown make an order "that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters,

or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression."

As a further protection the federal rules provide that an answer may be compelled only by an order of the court and no contempt process shall be employed until the order has been disobeyed (Rule 37). If upon application to the court for such an order it appears that the refusal was unjustified the cost of the application for the order, including reasonable attorneys fees, shall be assessed against the party or witness refusing to answer or against counsel advising such refusal (Rule 37-a).

The federal rules authorize either party to serve upon the other a written request for the admission of any relevant matter of fact, or of the genuineness of any relevant document, and if such admission is unjustifiably refused the party refusing shall be required to pay the cost of proof, including reasonable attorneys fees (Rule 37-c).

If the party seeking discovery fails to attend the hearing or fails to take proper steps to have his witness there, the court may order him to pay to the other party the amount of the reasonable expenses which he incurred in attending the hearing, including reasonable attorneys fees (Rule 30-g).

Under the federal rules examination of tangible things and of land may be had upon the order of the court (Rule 34), and a physical or mental examination of a party may be ordered in proper cases (Rule 35). Mutuality of disclosure is assured in case of such mental and physical examination by the provision that if the party examined at the instance of his adversary shall request and obtain the physician's report of that examination,

he must, if requested, give to his adversary a report of any other examination of the same physical or mental condition which has been or shall be made at his own instance.

10. Summary Judgments

It frequently happens that although an issue of fact appears upon the pleadings there is really no actual controversy involved. If there is no genuine issue to be tried, the case ought to be determined without sending it to trial. A pre-trial hearing might disclose the situation. But a very convenient and effective method has been employed in England and in more recent years in New York, Michigan, Illinois, and some other states, for determining upon affidavits whether there is any genuine issue to be tried, and for summarily rendering a final judgment for the party entitled to it in case no such issue exists. The federal rules provide a very simple method for this purpose (Rule 56). A motion with or without affidavits may be made by either party, for a summary judgment, at any time after the answer is filed. The adverse party may thereupon file opposing affidavits if he desires to do so. The court will then inspect the record, including the pleadings, and all affidavits, depositions or admissions on file, and if it appears that there is no genuine issue to be tried and that the moving party is entitled to judgment as a matter of law, a final judgment will then and there be rendered.

11. Special Verdict

Special verdicts at common law were required to be sufficient on their face to fully sustain the judgment rendered. It followed that if any material fact were omitted or if the special verdict contained, instead of a material fact, a mere conclusion of law or mere matters of evidence, the party having the burden of proof could not obtain a judgment upon it. The risk of losing the judgment on account of some inadvertent omission or on account of an error in the manner of stating the facts in

the special verdict was so great that parties hesitated to employ the special verdict, notwithstanding the great advantage which it offered of relieving the jury from the difficult and hazardous task of applying the law to the facts under general instructions from the court. The federal rules have eliminated this risk by providing that as to any matters not submitted or asked to be submitted to the jury, the parties will be presumed to have waived their right to trial by jury, and the court may make a finding regarding such matter, or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment which it renders on the special verdict (Rule 49-a). This is the practice employed in Wisconsin and it has proved so successful that the general verdict has become almost obsolete in that state.

12. Motion for Directed Verdict

The use of a motion for a directed verdict has been made very useful and effective by a provision in the federal rules that when such a motion, made at the close of all the evidence, is denied or for any reason is not granted, the court shall be deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion (Rule 50). This will enable the court to obtain the verdict of the jury for subsequent use as the basis of a judgment if a judgment upon the verdict ought to be rendered. But it will, at the same time, enable the court, in case it shall conclude on further investigation that the motion for a directed verdict ought to have been sustained, to render a final judgment contrary to the verdict, instead of merely order a new trial as at common law. This practice has been in use for many years in a number of American states and has proved of great value.

There are many other features of the new federal rules which contain interesting suggestions, such as the rules abolishing demurrers, rules prescribing to what extent amendments relate back to the date of the original pleading, rules for substitution of parties, for severance and consolidation of actions,

for the use of masters. But enough has been said to indicate the thorough-going way in which a simplified system of procedure has been worked out for the federal courts, and the numerous opportunities for improving a somewhat conventional state practice which a study of the federal rules may disclose.